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In the Supreme Court of the United States

OCTOBER TERM, 1984

BLINDER, ROBINSON & CO., INC. AND MEYER BLINDER,
PETITIONERS
v.
SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly enjoined petitioners from committing further violations of the federal securities laws on the basis of findings that supported a conclusion, although not expressly stated, that petitioners were likely to commit such violations in the future.

2. Whether the district court correctly concluded that petitioners violated antifraud and antimanipulation provisions of the federal securities laws.

3. Whether the district court's rejection of petitioners' defense of reliance on counsel is clearly erroneous.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-6a) and the district court (Pet. App. 9a-36a) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1983. A petition for rehearing was denied on July 23, 1984 (Pet. App. 7a-8a).[1] The petition for a writ of certiorari was filed on October 22, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]A second petition for rehearing, filed July 31, 1984, is still pending before the court of appeals.

STATEMENT

1. Petitioner Blinder, Robinson & Company (Blinder, Robinson) is a broker-dealer registered with the Securities and Exchange Commission. Petitioner Meyer Blinder is its president and principal shareholder. Pet. App. 9a. In 1979, Blinder, Robinson entered into an agreement with American Leisure Corporation (ALC), a new business with no operating history, to act as underwriter for a $25 million public offering of its securities (*id.* at 10a-11a).

The offering, consisting of 10 million units of one share of common stock and two warrants priced at $2.50 per unit, was on a "best efforts, all or none basis" (Pet. App. 10a). If all of the units were not sold to the public during the 90-day period during which the offering would be open, all proceeds would be returned and the offering terminated (*id.* at 11a). The prospectus represented that all funds received from investors would be deposited in an escrow account in Metro National Bank of Denver, Colorado (C.A. App. 613).

Because the offering was on an all-or-none basis, petitioners' compensation was largely contingent on its success. If it were able to sell the offering, Blinder, Robinson would receive $2.25 million in commissions plus $250,000 for expenses. If the offering failed, the firm would receive only $25,000 and be reimbursed for certain expenses. C.A. App. 614, 709, 724.

Despite a vigorous sales campaign — which included misrepresentations and fraudulent price predictions (Pet. App. 19a) — petitioners could not sell the entire offering to the public by the closing date of March 25, 1980 (*id.* at 15a). Rather than return investors' funds, however, they contrived a series of non-bona fide transactions in the final days before the closing date to create the impression that the all-or-none contingency had been satisfied (*id.* at 27a-28a).

In one of these transactions, ALC itself indirectly financed a purchase of 600,000 units by Scope, Inc., which borrowed the necessary $1.5 million from a Florida bank. As an accommodation for this loan, ALC agreed to deposit $3 million with the bank, half of which would earn interest at a below-market rate of 2% less than the rate being charged Scope. Pet. App. 16a. In another transaction, proceeds from a Metro National Bank loan facilitated by a Blinder, Robinson sales representative were used to purchase another 400,000 units of the offering (*ibid.*).

A third transaction involved Blinder, Robinson's own purchase of 956,393 units, slightly less than ten percent of the offering. Although petitioners purported to pay for this purchase with the proceeds of an unsecured loan from Metro National Bank, the funds were in fact an improper advance on Blinder, Robinson's unearned commissions out of the escrow account. Pet. App. 16a, 28a-29a. Contrary to the advice of counsel, petitioners placed these units in Blinder, Robinson's trading account for immediate resale to the public (*id.* at 16a; C.A. App. 205, 434). After the deadline for the closing of the offering, Blinder, Robinson distributed ALC securities to the public from its trading account and simultaneously began purchasing ALC securities in the over-the-counter market and making a market in the securities (Pet. App. 17a, 24a-25a).[2] Contrary to the advice of counsel, petitioners made a "business decision" not to supplement the prospectus. Accordingly, investors were not informed of the circumstances under which 20% of the units were deemed sold in the final days before the offering was to be closed. *Id.* at 21a-23a, 33a.

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[2]A dealer "makes a market" in a security when it holds itself out as willing to buy and sell that security on a regular basis for its own account.

2. The Commission brought this action in the United States District Court for the District of Colorado, alleging that petitioners and others[3] violated antifraud and antimanipulation provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 and regulations thereunder in connection with the ALC offering.[4]

a. Following a nonjury trial, the district court found that petitioners had violated each of the charged provisions (Pet. App. 18a, 24a-25a, 27a, 28a-29a). The court found that petitioners' sales force followed "a program of deliberately deceptive misinformation which Blinder orchestrated" and that petitioners concealed "the frantic manipulations which resulted in the pretension that all of the issue had been sold by the March 25 deadline" (*id.* at 21a).[5] The court also concluded that, by purchasing 956,393 units for their trading account, petitioners fell short of selling out the offering by the closing date (*id.* at 26a). "[C]onsequently, the distribution continued after the purported closing" on March 25, and petitioners violated Rule 10b-6 (17 C.F.R. 240.10b-6) by making a market in ALC securities after that date (Pet. App. 26a).

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[3]The other defendants entered into consent decrees with the Commission.

[4]The complaint charged violations of the following provisions, which are set forth at Pet. App. 37a-42a: Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a); Sections 10(b) and 15(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and 78*o*(c); and Rules 10b-5, 10b-6, 10b-9, and 15c2-4, 17 C.F.R. 240.10b-5, 240.10b-6, 240.10b-9, 240.15c2-4.

[5]In this regard, the court recognized (Pet. App. 22a) the importance of the "all or none" contingency to investors:

> [I]n an "all or none" offering of securities by a new company, whether all the securities have been sold to the public in bona fide transactions is of particular importance because the "all or none" contingency is the investors' principal protection. Each investor is comforted by the knowledge that unless his judgment to take the risk is shared by enough others to sell out the issue, his money will be returned.

The court rejected petitioners' defense of reliance on advice of counsel, finding that, having failed both to make complete disclosure to counsel and to follow counsel's advice (Pet. App. 31a-33a), petitioners "cannot hide now behind legal advice which [they] chose to ignore" (*id.* at 33a). The court emphasized that petitioners' mental state went beyond recklessness: "throughout their involvement with the [ALC] offering," petitioners "acted with a knowing 'intent to deceive, manipulate, or defraud' " (*id.* at 27a, 24a (citation omitted)). The court enjoined petitioners from future violations of the antifraud and antimanipulation provisions of the federal securities laws (*id.* at 33a-36a).

b. The court of appeals affirmed (Pet. App. 1a-6a). The court upheld the district court's factual findings and its conclusion that petitioners had violated federal law as charged by the Commission (*id.* at 2a, 3a-5a). In affirming the injunction, the court concluded that "[t]he findings of the trial court * * * are sufficient to support the injunctive relief," noting in particular "the nature of the violations, the knowledge that certain actions were in violation, [the] placement of the shares purchased in the trading account, the deliberate deception by the sales force and the finding by the trial court on scienter" (*id.* at 5a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' contentions do not merit further review.

1. Petitioners argue (Pet. 6-10) that the district court erred in enjoining them from committing further violations of the antifraud and antimanipulation provisions of the federal securities laws without an express finding concerning the likelihood that their violations would recur. Petitioners do not contend that the evidence is insufficient to

establish the likelihood of future violations, nor do they claim that the district court's findings of fact are insufficient to support such a conclusion. Rather, they argue only that the district court committed reversible error by failing to make that conclusion explicit. This argument is without merit.

The standard for issuing an injunction against future violations of the law is whether "the inferences flowing from the defendant's prior illegal conduct, viewed in light of present circumstances, betoken a 'reasonable likelihood of future transgressions.' " *SEC* v. *Zale Corp.*, 650 F.2d 718, 720 (5th Cir.), cert. denied, 454 U.S. 1124 (1981). The findings of the district court are more than adequate to support such a conclusion here. The district court found, and the court of appeals agreed, that petitioners, who are securities professionals, engaged in a deliberate scheme to mislead investors, in the course of which they violated numerous provisions of the federal securities laws. See pages 2-5, *supra*. Petitioners' violations continued until they entered into a stipulation with the Commission to cease trading ALC securities five months after the purported closing of the offering (Pet. App. 26a). Under these circumstances, a finding of the likelihood of future violations, which was in any event implicit in the district court's findings and its order,[6] was surely supportable. The court of appeals properly noted that where, as here, the district court's factual determinations are adequate and supported by the record, "[n]o particular recitations are required" (*id.* at 6a). Accord *SEC* v. *Savoy Industries*, 587 F.2d 1149, 1168 (D.C. Cir. 1978), cert. denied, 440 U.S. 913 (1979)

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[6]See *SEC* v. *Culpepper*, 270 F.2d 241, 250 (2d Cir. 1959). Petitioners do not contend that the district court was unaware of the correct legal standard for the issuance of injunctions against future violations.

("The absence of an express finding on the probability of future violations by the district court does not impair our ability to sustain the district court's injunction where the necessary factors are so obviously present.").[7]

2. Petitioners argue next (Pet. 10-13) that the district court erred in holding that their own purchase of over 950,000 units of the ALC offering violated the securities laws. But the courts below did not conclude that this purchase itself violated the law. Rather, it was petitioners' market-making activities during the pendency of the offering that were found to have violated Rule 10b-6, 17 C.F.R. 240.10b-6. See Pet. App. 4a, 26a. "Rule 10b-6 is an antimanipulative provision designed to protect the orderliness of the securities market during distributions of stock" by "maintaining an orderly market * * * free from artificial or manipulative influences." *Piper* v. *Chris-Craft Industries,* 430 U.S. 1, 43, 45 (1977) (footnote omitted). Under the Rule, an underwriter may not commence market making before "he has distributed his participation" in the offering. 17 C.F.R. 240.10b-6(c)(3)(ii). Petitioners' distribution was not complete at the time of the purported closing of the offering because their own purchase of the units was not for investment, but for the purpose of continued sales to the public. See 17 C.F.R. 240.10b-6(c)(3)(iii). Accordingly,

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[7]Petitioners' reliance (Pet. 8) on *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90 (2d Cir. 1978), is misplaced. There, an injunction was modified to exclude two defendants because of their limited connection with the unlawful activities and because the Commission had failed to make a sufficient showing of the likelihood of future violations (*id.* at 100-101). The case does not stand for the proposition that an explicit finding is required where the evidence is sufficient to support an inference of the probability of future violations. Indeed, the Second Circuit has upheld injunctions in such circumstances without an explicit finding by the district court. See *SEC* v. *Management Dynamics, Inc.*, 515 F.2d 801, 807-808 (1975); *SEC* v. *Culpepper, supra.*

regardless of whether petitioners paid full purchase price for the units (see Pet. 11-12), their market-making activities after the purported closing date were squarely prohibited by the Rule. See *Piper*, 430 U.S. at 43; *Batten & Co.* v. *SEC*, 345 F.2d 82, 84 (D.C. Cir. 1964); *SEC* v. *R.A. Holman & Co.*, 366 F.2d 446, 449 (1966), modified on other grounds, 377 F.2d 665 (2d Cir.), cert. denied, 389 U.S. 991 (1967).[8]

3. Finally, petitioners argue (Pet. 13-17) that they did not act with scienter because they relied in good faith on the advice of counsel. The district court correctly rejected this defense on the facts (Pet. App. 31a-33a), and the court of appeals upheld its findings (*id.* at 2a, 5a). The claim that the district court's findings are clearly erroneous does not merit further review. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938).

The district court found that petitioners did not rely in good faith on the advice of counsel. In requesting advice regarding the firm's purchase of ALC units, petitioners failed to make complete disclosure to counsel,[9] and "[a]t no time did Blinder inquire [of counsel] as to the legality of other action it took to complete the offering by its deadline"

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[8]Petitioners also clearly violated Rule 10b-9, 17 C.F.R. 240.10b-9, by failing to make refunds after the offering failed to sell (Pet. App. 4a, 27a-28a). They do not allege any conflict among the circuits with respect to the interpretation of the Rule; that this case is not factually identical to other cases involving the Rule does not, as petitioners suggest (Pet. 11-12 n.18), detract from their violations. Contrary to petitioners' contention (Pet. 12-13), this case does not present the question whether scienter is an element of a violation of Rules 10b-6 or 10b-9. The district court found that petitioners acted with scienter in all of their violations (Pet. App. 26a-27a, 32a).

[9]Petitioners did not inform counsel of the firm's intent to buy the ALC securities for its trading account (rather than its investment account) and to continue selling them to the public, of the source of their funds for the purchase, or of the possibility of accommodating loans to induce purchases by third parties (Pet. App. 32a-33a).

(Pet. App. 32a). Most telling, petitioners "failed to follow the advice" that was given by counsel (*id.* at 33a). In particular, they refused to follow counsel's advice to update the offering prospectus to inform investors of their purchase of over 950,000 units (*ibid.*). Having made a business decision not to follow that advice, Blinder, Robinson "cannot hide now behind legal advice which it chose to ignore" (*ibid.*). Accordingly, this case does not present any issue with respect to the effect of a defendant's reliance on counsel. See *SEC* v. *Savoy Industries,* 665 F.2d 1310, 1314-1315 n.28 (D.C. Cir. 1981); *Arthur Lipper Corp.* v. *SEC,* 547 F.2d 171, 181-182 (2d Cir. 1976), cert. denied, 434 U.S. 1009 (1978); *SEC* v. *Senex Corp.,* 399 F. Supp. 497, 507 (E.D. Ky. 1975), aff'd, 534 F.2d 1240 (6th Cir. 1976). Petitioners' claim to the contrary is simply an attempt to reargue the facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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